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No. 01–

IN THE

Supreme Court of the United States

MICHAEL TODD BROSIUS,

Petitioner,

v.

WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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105 pp

QUESTIONS PRESENTED

In *Burns v. Wilson*, 346 U.S. 137 (1953), this Court decided in a plurality opinion that military service members convicted at a court-martial may seek review of their convictions under the federal habeas corpus statute, 28 U.S.C. § 2441. Nearly fifty years after *Burns* and in a time when the question is of significant national importance, however, the federal courts are at odds over what *Burns* means. In the decision below, the Third Circuit held that its inquiry may go no further than its inquiry when reviewing state court convictions under 28 U.S.C. § 2254(d), a section of the Antiterrorism and Effective Death Penalty Act ("AEDPA") enacted in 1996. Accordingly, the questions presented here are:

Whether a military habeas corpus petitioner is entitled to *de novo* review of constitutional and legal issues and mixed issues of law and fact, where the facts are undisputed and the petitioner does not challenge the trial court's reasonable findings of fact; and

Whether Petitioner is entitled to habeas corpus relief under the properly applied scope of reviewing military convictions.

This is the time and the case for this Court to resolve these issues. There are more than two million Americans subject to the military justice system with the potential for others to be subject to the decisions of military tribunals. A clear standard should be articulated.

PARTIES TO THE PROCEEDINGS

The only parties to the proceeding are Petitioner Michael Todd Brosius, an individual, and his custodian at the time the Petition for a Writ of Habeas Corpus was filed, the Warden of the United States Penitentiary at Lewisburg, Pennsylvania.

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PETITION FOR A WRIT OF CERTIORARI

Michael Todd Brosius respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a) is reported at 278 F.3d 239. The opinion of the district court (Pet. App. 18a) is reported at 125 F. Supp. 2d 681.

The opinion of the U.S. Army Court of Military Review (Pet. App. 46a) is reported at 37 M.J. 652. The order of the U.S. Court of Military Appeals granting Brosius's petition for review and summarily affirming the conviction without opinion (Pet. App. 65a) is reported at 39 M.J. 378.

JURISDICTION

The Third Circuit entered the decision below on January 23, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The federal habeas corpus statute, 28 U.S.C. § 2241, provides:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless — . . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .

The portion of the habeas corpus statute, 28 U.S.C. § 2254, containing a provision enacted as part of the 1996 Antiterrorism and Effective Death Penalty Act provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. . . .

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

This case squarely presents a recurring question that is dividing the lower courts and has not been — but should be — resolved by this Court: whether federal courts should review *de novo* the merits of legal and constitutional claims in habeas corpus proceedings arising from military court-martial convictions. This case presents issues of law and is not fact-bound, because the basic facts here are undisputed.

1. Petitioner Michael Todd Brosius is serving a 75-year sentence after an Army general court-martial conviction for unpremeditated murder. At the time of his conviction, Brosius was a 24-year-old soldier who had served in the Army for four years. His conviction was based largely on statements that agents from the Army Criminal Investigation Division ("CID") obtained from him. The constitutional admissibility of those statements is the central issue in this case. Although Brosius

had admittedly been with a woman soldier in the early morning hours of the day she was killed, there was no physical or forensic evidence that tied him to the crime. Pet. App. 19a.

2. The basic law governing admissibility of the statements is clear. Federal military law requires warning of the right to remain silent for "a person suspected of an offense." *United States v. Muirhead*, 51 M.J. 94, 96 (C.A.A.F. 1999);[1] Uniform Code of Military Justice art. 31(b), 10 U.S.C. § 831(b) [hereinafter UCMJ]. This warning is required even if a person is not in custody, as long as the person is a "suspect." *United States v. Swift*, 53 M.J. 439, 445 (C.A.A.F. 2000), *cert. denied*, 531 U.S. 1150 (2001). "The determination of whether a person interviewed is a suspect is a question of law." *Muirhead*, 51 M.J. at 96. In considering this question, courts use an objective standard, but courts also find that soldiers are suspects if the agents subjectively believed that they were. *Id.* Thus, soldiers are entitled to warnings if they are "suspects" under *either* the objective *or* the subjective standard.

The more familiar *Miranda* warnings of the right to remain silent *and* the right to counsel also apply to military members who are undergoing custodial interrogation. *Davis v. United States*, 512 U.S. 452, 457 n.* (1994); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Here, Brosius requested counsel, but the agents provided the prosecutor to him. The issue is whether he was in "custody" when he requested counsel, another question of law that courts review *de novo* based on underlying facts. *Thompson v. Keohane*, 516 U.S. 99, 106-07 (1995). To decide this issue, courts use an objective standard. The test is whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave," and "the ultimate inquiry" is whether there was a "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id.* at 112 (quoting *California v.*

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[1] "Court of Appeals for the Armed Forces" (C.A.A.F.) is the same court as the previously-named U.S. Court of Military Appeals.

Beheler, 463 U.S. 1121, 1125 (1983), and *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). This determination is no more difficult in a military setting, but it is slightly different because soldiers may be ordered or directed to act and usually have some restrictions on movement simply by the very nature of being a soldier on a base.

Federal courts may grant a writ of habeas corpus to any prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241. This includes military prisoners. *Burns v. Wilson*, 346 U.S. 137, 139 (1953). Courts can "determine whether the military have given fair consideration to each of [the] claims" that military prisoners raise, *id.* at 144, but "when a military decision has dealt fully and fairly with an allegation raised in [the habeas] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Id.* at 142.

3. There is no need for a factual re-evaluation in this case, because the facts are undisputed. During the early hours of Saturday, June 2, 1990, Private First Class Tammy Ivon was found near death on a U.S. Army base in Germany. She died from her injuries. Army CID agents began their investigation shortly after the discovery of Ivon's body.

Late Saturday afternoon, the agents were interviewing witnesses in the office of Brosius's First Sergeant, and they had their initial interview with Brosius. Brosius was ordered to attend the CID interview, because Brosius's First Sergeant "called" him to the office and "sent" him there. Pet. App. 38a, 40a. At this time, the agents had sufficient facts to regard Brosius as a suspect under the prevailing *Muirhead* objective standard.

> Before they questioned Brosius, the agents knew that the decedent had entered the base in the early morning hours of June 2 shortly before her murder, and that the gate guards had reported that only one person was with her at the time;

> Throughout their investigation on June 2, the agents were "looking aggressively for that one person" who was with the decedent;
>
> Before interviewing Brosius, the agents were in the process of verifying an alibi for another suspect;
>
> Within minutes after they began questioning Brosius, the agents knew that Brosius was the one person that they had been looking for aggressively; and
>
> Within minutes after they began questioning Brosius, they heard Brosius say there was a third person in the car, which was inconsistent with what the gate guards had reported.

See Pet. App. 24a-25a.

Brosius immediately made a request that either his First Sergeant or a lawyer be present. Instead of asking the First Sergeant to come into the office, the agents directed Brosius to go to CID headquarters (the "River Building"). At the agents' request, the First Sergeant had another Sergeant "escort" Brosius there. *Id.* 12a. The agents told Brosius that *he would be able to see a lawyer there. Id.* 21a. The agents said that the only reason they sent him to the River Building was "because that's where the attorneys were." R.146.[2]

While Brosius was being transported to the River Building, the prosecutors learned of Brosius's impending arrival and that he expected to see a lawyer. The prosecutors decided that it would be sufficient to allow Brosius to meet with the prosecutor in charge of the investigation, Captain Harper Ewing. Pet. App. 3a, 23a-24a. When Brosius arrived, he was told that an attorney was present, because "you requested one." *Id.* 29a. Ewing was introduced to him as being "from JAG," R.177, without a disclosure that Ewing had been assigned to the case as the prosecutor. Pet. App. 42a n.7. Ewing soon

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[2] Relevant portions of the transcripts of Petitioner's pretrial hearings are included in a Supplemental Appendix filed with the Third Circuit.

discovered, however, that Brosius was Ewing's client for an unrelated civil matter. Thus, Ewing took Brosius to a separate room and said that he was "working with the cops." *Id.* 4a.

Before Brosius's interview at the River Building, Ewing heard Brosius make a second request for counsel. This request was clear and unambiguous, *id.* 23a, 42a, but Brosius still did not receive his own counsel. Ewing sat with Brosius during the interview, and the result was a statement that was used against Brosius at his trial. After the interview, the agents seized Brosius's clothing and sent it to a laboratory for analysis, because they learned that it was the same clothing he was wearing when he entered the base with the decedent. *Id.* 24a.

The agents said they formed the belief the following morning that Brosius was a "suspect." They called Brosius for another interview, and they obtained a rights waiver and a "confession" from him. Certain details appearing in the statements are inconsistent with the details of the murder and the physical evidence. *Id.* 53a. The written statements are unusual in that, at the end, Brosius wrote "I don't believe I did it" and "I feel like I falsified the whole statement." *Id.* 19a. It is undisputed that during this interrogation in the absence of any attorney representing his interests, Brosius was crying and curled on the floor in a fetal position as the questioning continued. Ewing was taken off the prosecution team the next day. *Id.* 23a.

4. At his court-martial, Brosius made a motion to suppress the statements, which was denied. *Id.* 20a. Brosius argued that he was a "suspect" when agents first questioned him, entitling him to rights warnings under UCMJ art. 31(b), 10 U.S.C. § 831(b). Further, Brosius argued that he was subjected to custodial interrogation and was entitled to rights warnings under the Fifth Amendment and *Miranda*.

The military trial judge, an Army colonel, denied Brosius's motion. Pet. App. 25a. He concluded that Brosius was not a "suspect" during his questioning. He also concluded that Brosius did not request counsel, although the district court,

which denied the habeas corpus petition, reviewed the facts in the record and found that there *had* been a request for counsel. *Id.* 42a. The military judge did not reach the issue of whether Brosius was in custody.

On appeal, the Army Court of Military Review ("ACMR"), consisting of Army officers, affirmed Brosius's conviction. *Id.* 46a. ACMR has a statutory obligation to review the entire record to ensure that Brosius was lawfully convicted. The court may weigh evidence and determine disputed issues of fact. UCMJ art. 66(c), 10 U.S.C. § 866(c). ACMR was obligated to correct the trial judge's errors, including a significant error in speculating on the existence of evidence.[3] It did not do so. Instead, ACMR apparently overruled the trial judge's speculation but did not correct the error. With respect to the custody issue, ACMR stated in passing, without reviewing any evidence, that Brosius was not in custody. Pet. App. 59a. Contrary to the district court's findings here, ACMR said that Brosius had not requested counsel. *Id.*

Brosius's then petitioned for appeal to the U.S. Court of Military Appeals ("COMA"). COMA reviews appeals on a discretionary basis "on good cause shown." UCMJ art. 67(b)(3), 10 U.S.C. § 867(b)(3). COMA granted Brosius's petition and then affirmed his conviction, all on the same day in a one-sentence order. Pet. App. 65a.

5. Brosius filed his Petition for Writ of Habeas Corpus in August 1999, alleging significant violations of constitutional and statutory rights and a fundamental violation of lawyer ethical standards. The district court had jurisdiction under 28 U.S.C. § 1331. The court denied the petition. Pet. App. 45a.

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[3] The trial judge had cogently asked the Army witness what new evidence arose on day two that made Brosius a suspect which was not before them on day one when the Army said he was not a suspect. There was no answer given to this question that pointed to any new evidence. Pet. App. 24a. If, by an objective standard, Brosius should have been determined to be a suspect on day one, he should have received the required warnings.

For its scope of review, the court said it was following a four-factor analysis that the Fifth Circuit had developed in *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975). Pet. App. 32a-33a. Although the court said it would review "certain mixed issues of law and fact," *id.* 33a, it actually determined only "whether the military courts gave full and fair consideration to the claim, not whether we would have made the same decision in their place." *Id.* 37a; *see also id.* 36a.[4]

Brosius raised issues that the district court did not address. The court declined to address the military judge's speculation on the existence of critical evidence to support his findings of fact. *Id.* 44a. The court also did not address the significant ethical issue relating to Ewing's participation. The lead agent described this as "walking the gray area." *Id.* 29a.

6. The Third Circuit had jurisdiction under 28 U.S.C. § 1291. The court stated that "[t]he degree to which a federal habeas court may consider claims of errors committed in a military trial has long been the subject of controversy and remains unclear." Pet. App. 5a. The court also recognized that its own prior decisions on the issue were "far from seamless."[5]

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[4] Before the district court, the Army initially took the extreme position that the court could not review the results of the case beyond deciding if issues that were raised had been considered by the military courts. The district court thereafter directed the Army to brief the merits. The Army's initial position shows that it still seems to be arguing the position which was rejected in *Burns*.

[5] These two comments by the Third Circuit summarize succinctly why this Court should grant the petition for certiorari. In 1968 the Third Circuit had applied a narrow scope of review. *See United States ex rel. Thompson v. Parker*, 399 F.2d 774, 776 (3d Cir. 1968). In 1973, however, the court said that it could review *de novo* those claims in military habeas corpus cases that were "not dependent upon any evidentiary or factual construction." *Levy v. Parker*, 478 F.2d 772, 783 (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 733 (1974). It is high time for a clear standard to be articulated.

Id. 7a. In this case, the Third Circuit stated "that at least absent a challenge to the constitutionality of the statute under which the defendant was convicted, . . . our inquiry in a military habeas case may not go further than our inquiry in a state habeas case." *Id.* 9a. The court then reviewed this case by applying the standards for reviewing state court convictions under 28 U.S.C. § 2254(d), a section of the habeas corpus statute that Congress enacted in 1996 and which states that a prisoner in custody after a state court conviction is not eligible for habeas relief unless the state court's proceeding

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Pet. App. 9a. *See* Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1219 (1996). Applying this scope of review, the court said that there was "no basis for rejecting the determination of the Army Court of Military Review that Brosius was not in custody" during his interrogation. Pet. App. 13a. The court believed it was unnecessary to decide whether Brosius was a suspect on June 2, reasoning that any failure to give rights warnings then was harmless error. *Id.* 14a.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S DECISION ON THE SCOPE OF REVIEW OF MILITARY COURTS-MARTIAL IN A HABEAS CORPUS PROCEEDING IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

To determine the proper scope of review for military courts-martial, the courts look to this Court's *Burns* decision for initial

guidance. The courts agree on only one thing, however: this is a completely confusing and standardless area of the law. As the D.C. Circuit stated in 1969, "The Supreme Court has never clarified the standard of full and fair consideration, and it has meant many things to many courts." *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969). The Third Circuit agreed, stating that the issue "has long been the subject of controversy and remains unclear." Pet. App. 5a. *See also Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990) (federal courts' interpretation of *Burns* is "anything but clear"); *Allen v. VanCantfort*, 436 F.2d 625, 629 (1st Cir. 1971) ("considerable confusion has surrounded the 'full and fair consideration' standard enunciated in *Burns*").

Believing that *Burns* is "far from clear in all respects," the Third Circuit nevertheless believed *Burns* "held that in considering a constitutional claim involving a pure question of law or a mixed question of law and fact, a habeas court may not exercise de novo review and may not go beyond considering whether the military courts 'dealt fully and fairly' with the claim." Pet. App. 7a (quoting *Burns*, 346 U.S. at 144). In this case, the Third Circuit concluded that its review of courts-martial could go no further than its review of "determinations made by state courts." *Id.* 9a. The court then reviewed Brosius's claims under standards that Congress set forth in 1996 in section 2254(d) of AEDPA.

Both the D.C. and Eighth Circuits likewise concluded — before section 2254(d)'s enactment — that federal courts may review claims in military cases in the same manner that they review similar cases arising from state court convictions. *See DeChamplain v. Lovelace*, 510 F.2d 419, 424 (8th Cir.), *stay granted*, 420 U.S. 940, *judgment vacated as moot*, 421 U.S. 996 (1975); *Kauffman*, 415 F.2d at 997. Both of these courts believed that their approach to reviewing military cases was consistent with *Burns*. Neither court, however, has applied the new section 2254(d) in reviewing military convictions.

In *Kauffman*, the D.C. Circuit stated "that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." *Kauffman*, 415 F.2d at 997. The court then reviewed the merits of the case, *id.* at 997-1000, and ultimately concluded that the military courts considered the petitioner's claims "in accordance with Supreme Court standards." *Id.* at 1000. The Eighth Circuit adopted *Kauffman*'s holding, emphasizing that "servicemen . . . enjoy the same rights of due process as civilians unless the government demonstrates a need for a different rule in the military." *DeChamplain*, 510 F.2d at 424.

At the other extreme, the First, Ninth, and Federal Circuits apply a *de novo* scope of review when considering collateral attacks on court-martial convictions, without referring to the manner in which courts review state court convictions. *Sisson v. United States*, 814 F.2d 634 (Fed. Cir. 1987); *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir. 1981); *Allen v. VanCantfort*, 436 F.2d 625 (1st Cir. 1971). In *Allen*, the court reviewed "on the merits" the petitioner's claims that he received ineffective assistance of counsel, that the charges against him were not sufficiently specific, and that his *Miranda* rights were violated. *Allen*, 436 F.2d at 629-31. In *Hatheway*, after stating that *Burns* "does not preclude civil court jurisdiction of the constitutional defects alleged here," the court reviewed *de novo* the merits of claims of selective prosecution and validity of a jury instruction, as well as the constitutionality of the statute under which the petitioner was convicted.[6] *Hatheway*, 641 F.2d at 1381-84.

The Federal Circuit has jurisdiction to consider the validity of court-martial convictions when individuals seek back pay,

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[6] *Hatheway* was not a habeas corpus proceeding but instead was based on the court's mandamus jurisdiction under 28 U.S.C. § 1361. *Hatheway*, 641 F.2d at 1379. However, the court cited *Burns v. Wilson* and applied the same principles that apply in habeas corpus proceedings.

because court-martial sentences may include discharges from the military, fines, and forfeitures of pay. Although the court defers to the military courts on factual matters, the Federal Circuit reviews constitutional and legal issues *de novo*. "*Burns v. Wilson* dealt with reevaluation of evidentiary issues and mere problems of proof, but the Supreme Court has made it very clear that constitutional and fundamental questions, going to the validity of the court-martial, can properly be reviewed by the civil courts." *Sisson*, 814 F.2d at 637 (citing *Schlesinger v. Councilman*, 420 U.S. 738, 744-45 (1975), and *United States v. Augenblick*, 393 U.S. 348, 356 (1969)).

Courts in the Fifth and Tenth Circuits use a hybrid approach, initially applying a four-factor test to determine which of a prisoner's claims they will review, but then applying a *de novo* scope of review to the claims ultimately considered. *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990); *Calley v. Callaway*, 519 F.2d 184, 199-203 (5th Cir. 1975). The four factors are: 1) whether the asserted error is of substantial constitutional dimension; 2) whether the issue is one of law rather than of disputed fact already determined by the military tribunals; 3) whether military considerations may warrant different treatment of constitutional claims; and 4) whether the military courts gave adequate consideration to the issues involved and applied proper legal standards. For claims that survive the four-factor test, the courts review the merits of military prisoners' claims *de novo* without referring to the manner in which they review state court convictions.

In *Calley*, for example, after concluding that review of certain claims was allowed after considering the four factors, the Fifth Circuit exhaustively considered *de novo* several claimed errors, including claims of unfair pretrial publicity, *Calley*, 519 F.2d at 203-13, denial of compulsory process, *id.* at 213-19, improper discovery disclosures, *id.* at 219-26, and improper notice of the charges and former jeopardy, *id.* at 226-27. The court declined to consider other issues that apparently were unique to the military. *Id.* at 227 n.68. Although the court

denied relief, it did so only "after a careful and painstaking review of this case that no violation of Calley's constitutional or fundamental rights has occurred" and because "Calley has been afforded every right under our American system of criminal justice to which he is entitled." *Id.* at 228.

The differences among the approaches are evident. In the Third Circuit, the courts now apply the 1996 deferential statutory standards for reviewing state court convictions and will grant relief only if the military courts made "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). The D.C. and Eighth Circuits decided prior to section 2254(d)'s enactment in 1996 and its accompanying restrictions that they would review military convictions as if they were state court convictions. The First, Ninth, and Federal Circuits perform a *de novo* review as long as the petitioner alleges constitutional violations. And as long as the four *Calley* factors are considered, courts in the Fifth and Tenth Circuits review constitutional issues *de novo.* Thus, under similar circumstances, United States military personnel could receive different treatment merely because they happen to be imprisoned in different locations.

The differences have a real impact on prisoners such as Brosius. For those who have strong claims that warrant habeas relief, the probability of successfully asserting those claims is significantly less in jurisdictions employing a deferential scope of review. On mixed questions of law and fact as are presented here, with respect to whether Brosius was a "suspect" or in "custody," and where the basic facts are undisputed, there should be a *de novo* or substantive review beyond merely rubber stamping in the name of deference what the military tribunal did. The courts should examine the undisputed facts and determine whether Brosius was entitled to rights warnings and whether he was entitled to conflict-free counsel.

II. THIS CASE PRESENTS IMPORTANT AND RECURRING QUESTIONS THAT SHOULD BE RESOLVED BY THIS COURT.

The questions presented by this case affect issues of increasing national importance and provide this Court with an opportunity to clarify important questions of law that have confounded and divided the federal courts since *Burns* was decided. Millions of American citizens serve in the Armed Forces and become subject to the Uniform Code of Military Justice. *See* U.S. Dep't of Defense, *Defense Almanac*, *at* http://www.defenselink.mil/pubs/almanac/ (visited Apr. 1, 2002) (1.37 million on active duty and 1.28 million in the reserves). During times of national crises, such as during the current war on terrorism, many reservists are called to active duty. Chief Justice Warren's words are just as relevant today as they were forty years ago: "When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question." Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188 (1962). While the question whether military prisoners may seek habeas corpus review has long been settled, the standards for reviewing their convictions are not uniform.

Thousands of courts-martial take place annually. During fiscal year 2000, courts-martial resulted in 6,994 convictions. *See* U.S. Court of Appeals for the Armed Forces, *Annual Reports on Military Justice for the Period October 1, 1999 to September 30, 2000*, *at* http://www.armfor.uscourts.gov/annual/FY00/FY00Rept.htm (visited Apr. 1, 2002) (reports of the Army, Air Force, Navy, and Coast Guard at sections 3, 4, 5, and 6). General courts-martial may impose death sentences or confinement for up to life. UCMJ art. 18, 10 U.S.C. § 818. There are at least three capital cases pending in the military appellate system. *See* U.S. Dep't of Navy, *Annual Report of the Judge Advocate General of the Navy* 6, *at* http://www.

armfor.uscourts.gov/annual/FY00/FY00NavyReport.pdf (visited Apr. 1, 2002).

The question concerning the proper scope of review will continue to arise frequently,[7] because military prisoners must seek habeas corpus review in the jurisdiction where they are confined. *See Daigle v. Warner*, 490 F.2d 358, 360 (9th Cir. 1973) (review of a Marine Corps case in Hawaii). Overseas prisoners may seek review in the federal courts for the District of Columbia. *Ex Parte Hayes*, 414 U.S. 1327, 1328-29 (1973). Even those who are not given prison terms or who have already served their confinement may seek review in the district courts or in the Court of Claims, because courts-martial sentences may include other punishments that affect military pay. *See United States v. Augenblick*, 393 U.S. 348, 349 (1969) (reviewing a Court of Claims decision); *Kauffman*, 415 F.2d at 994 (Air Force officer had already served his period of imprisonment). Once they seek that review, however, the forum court will apply whatever variant of the *Burns v. Wilson* "full and fair" consideration standard it finds persuasive at the time.

Federal courts — either as a result of precedent or statutes — do have uniform standards for reviewing civilian prisoners' cases. Prior to AEDPA's enactment in 1996, courts reviewed state prisoners' constitutional and legal claims *de novo*. As Yale Professor Joseph W. Bishop wrote in 1974, "If a federal court is satisfied that a state prisoner was, in fact, denied the effective assistance of counsel, or that a coerced confession was in fact admitted in evidence against him, it will grant the writ regardless of what the state courts may have thought about those issues." Joseph W. Bishop, Jr., *Justice*

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[7] Recent district court cases include: *Ingram v. Tillery*, 42 F. Supp. 2d 1188 (D. Kan.), *aff'd*, 201 F.3d 448 (1999); *Jordan v. Warden*, No. Civ. 1:CV-97-0465, 1998 WL 614694 (M.D. Pa. Aug, 31, 1998); *Romey v. J. Vanyur*, 9 F. Supp. 2d 565 (E.D.N.C. 1998); and *United States v. Wallace*, No. CIV. A. 96-3893, 1997 WL 476340 (E.D. La. Aug. 19, 1997).

Under Fire 133 (1974). Before AEDPA, "federal courts could adjudicate the complaint on the basis of legal principles that had *never* become binding on state courts, *i.e.*, on the basis of federal circuit law developed in the absence of any controlling Supreme Court law on point." 2 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 30.2a, at 1233-34 (3d ed. 1998) (emphasis in original). After AEDPA's enactment, standards for reviewing state court convictions became narrower, but nevertheless remained uniform. Likewise, uniform standards govern review of federal court convictions under 28 U.S.C. § 2255.

Military prisoners are the only class of United States citizens whose convictions are subject to varying standards of review in the federal courts. By its own terms, section 2254 applies only to review of state court convictions. Further, courts-martial are not the type of federal courts falling under the provisions of section 2255.

When Congress enacted AEDPA in 1996, it left undisturbed whatever principles this Court and other courts had established for reviewing military convictions. If courts use *Burns v. Wilson* as authority that they should use standards for reviewing state court cases, it certainly is not clear that they should apply the new AEDPA section 2254(d) standards. The Third Circuit's decision appears to be the only case applying AEDPA's standards to military convictions. The new section 2254(d) plainly "requires federal courts to accord more respect than previously was due to a state court determination of law." 2 Liebman & Hertz, *supra*, § 30.2b, at 1236.

Thus, if this Court in 1953 intended federal courts to perform a comparable or somewhat narrower review of military convictions than of state convictions under then-existing principles, the standard for reviewing military convictions now may actually be *broader* than the standards for reviewing state convictions under the new section 2254(d). Some authorities believe that federal court review of courts-martial convictions historically *was* broader than review of state court convictions

before AEDPA's enactment. Justice Frankfurter argued that the *Burns* plurality's statement that review of military convictions was narrower was "demonstrably incorrect." *Burns v. Wilson*, 346 U.S. 844, 844 (1953) (opinion of Frankfurter, J., in order denying rehearing). *See also Calley*, 519 F.2d at 198 n.20; Bishop, *supra*, at 136. The Third Circuit erred in this case by applying the more restrictive current standards of AEDPA.

American citizens who wear military uniforms deserve uniform procedures when they are subjected to military criminal justice, both under the UCMJ when their courts-martial are conducted and in the civilian courts if they seek habeas corpus review. The degree to which the courts examine military convictions should not vary depending only on the happenstance of where these American citizens are confined within the federal penal system. This Court should therefore grant this petition for a writ of certiorari and establish a uniform standard of habeas corpus review.

III. A *DE NOVO* SCOPE OF REVIEW SHOULD BE APPLIED TO THE MILITARY COURTS' LEGAL AND CONSTITUTIONAL RULINGS.

Where a habeas petitioner challenges only the military courts' legal and constitutional rulings and does not dispute reasonable factual findings, this Court should hold that the military courts' rulings are subject to *de novo* review. Here, the facts establish that Todd Brosius requested counsel but was given the prosecutor who happened to be Brosius's counsel for another matter. With a *de novo* scope of review, the Court should determine that Brosius was a "suspect" in "custody" and that the CID agents violated Brosius's rights under the UCMJ and the Fifth Amendment.

A. The Court should hold that a *de novo* review is required.

Federal civilian courts undoubtedly are qualified to ensure that military members' legal and constitutional rights are

respected properly and are not grossly violated. The type of collateral review that Brosius seeks here is consistent with this Court's long-standing *Burns* case, will not interfere with administration of military justice, and requires only that the courts apply well-understood principles of law.

First, *Burns* does not prohibit *de novo* review of legal and constitutional claims. The petitioners in *Burns* openly requested a re-evaluation of the record to contest disputed factual matters that had previously been resolved against them. *Burns*, 346 U.S. at 139, 144. The Court held that "when a military decision has dealt fully and fairly with an allegation raised in the [habeas] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Id.* at 142. Brosius is not asking for such a re-evaluation of evidence here, because the facts are undisputed. He asks only that the Court resolve legal and constitutional issues based on the undisputed facts. Where the military courts do not resolve factual issues "fully and fairly," of course, such as when they speculate on the existence of evidence to support key findings, *Burns* does allow a factual review.

Second, reviewing Brosius's claims *de novo* will not interfere with the military justice system. A *de novo* review in a military habeas corpus case has no more potential to interfere with the military than a direct review on a petition for certiorari, such as in *Davis v. United States*, 512 U.S. 452 (1994). *See also Jordan v. United States*, 498 U.S. 1009 (1990) (granting petition for certiorari and remanding case to the Court of Military Appeals). In addition, *de novo* review of courts-martial does not result in any intrusion into the exercise of power by another sovereign, *see Engle v. Isaac*, 456 U.S. 107, 128 (1982), because federal courts are an instrumentality of the same sovereign that administers courts-martial.

Third, civilian courts are at least as well-equipped as military courts are to review the types of legal and constitutional issues presented here. Although federal courts are willing to defer to the military on issues that are unique to

the military, *see Calley*, 519 F.2d at 227 n.68, this case presents common issues that are well within the ability of civilian courts to consider.

B. Although Todd Brosius requested counsel, the agents provided the prosecutor to him, who happened to be Brosius's counsel for a civil matter.

Civilian courts can easily resolve *de novo* whether Brosius was entitled to see a lawyer other than the prosecutor. There is no dispute that Brosius requested counsel. The agents understood his request at the First Sergeant's office, because they sent him to the River Building and *told him he would be able to see a lawyer there*. Pet. App. 21a. The only reason they sent him there was "because that's where the attorneys were." R.146. Without question, the agents led Brosius to believe that he would get counsel. The agents' and prosecutors' conduct following the multiple requests, however, is nothing less than mind-boggling.

While he was being transported to the River Building, the agents and the prosecutors devised a scheme of deception. There is no other way to explain what transpired. After the prosecutors[8] huddled with each other and apparently decided to take advantage of the initial counsel request that they perceived as ambiguous, they decided that Brosius would not be given his own individual counsel. Instead, they would allow him to meet with the prosecutor supervising the investigation, Captain Ewing. Pet. App. 23a-24a. Ewing did not know, of course, that the soldier about to appear was his own client concerning an unrelated civil matter. When Brosius arrived at the River Building, he was told that an attorney was present, because "you requested one." *Id.* 29a. Ewing was introduced as being "from JAG," R.177, without a disclosure that Ewing had been assigned to the case as the prosecutor. Pet. App. 42a n.7.

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[8] The district court mistakenly referred to one of these officers as the "senior trial *defense* counsel." Pet. App. 23a-24a.

Ewing, continuing the deception (willful or accidental), had no intention of ensuring that Brosius's rights were respected or of being Brosius's personal defense counsel.

Ewing surely must have been surprised when he found out that Brosius already was Ewing's own client for another matter. Ewing saw the need to give *some* explanation to Brosius. He went to a separate room with Brosius and said only that he was "working with the cops." Pet. App. 4a.

Ewing's brief private talk with Brosius was insufficient to resolve the ethical issue presented. Ewing clearly had conflicts of interest. First, he was a prosecutor blithely passing himself off as one who could look after Brosius's interests; and second, he learned that Brosius was already a client on a civil matter. He was involved in a charade where he was representing the questioners and the suspect. He became obligated to either continue his representation of one party after full disclosure to and consent from both, or to withdraw. Either way, he had a law enforcement obligation and, as a lawyer, an ethical obligation to ensure that Brosius's interests were protected and to ensure that proper substitute counsel was provided for Brosius before his interrogation continued. The Third Circuit was troubled by Ewing's actions, but described Ewing's actions only as "inadvisable." *Id.* 16a.

Ewing appears to have been completely unaware of his obligation or so caught up in the deception that he failed to take proper action under *Miranda* when he personally heard Brosius make a second and unambiguous request for counsel. *Id.* 23a. There can be no question that, regardless of what had transpired so far, the interrogation should have been halted at that time until Brosius was provided with his own counsel.

Continued questioning under these circumstances was a horrible breach of the rules of professional conduct. A soldier is entitled to "a lawyer who is peculiarly and entirely the accused's own representative." *United States v. Tempia*, 37 C.M.R. 249, 259 (C.M.A. 1967). Military lawyers, just like

civilians, are ethically prohibited from representing clients with opposing interests unless both clients consent after proper disclosures. Dep't of Army Reg. 27-26, *Legal Services: Rules of Professional Conduct for Lawyers*, Rule 1.7 (May 1, 1992).[9] When terminating or withdrawing, lawyers must "take steps to the extent reasonably practicable to protect a client's interests." *Id.* Rule 1.16(d).

C. Brosius was a "suspect" entitled to rights warnings.

Brosius made his request for counsel at a time when the CID agents should have considered him to be a "suspect," which entitled him to a warning of the right to remain silent, *United States v. Muirhead*, 51 M.J. 94, 96 (C.A.A.F. 1999); UCMJ art. 31(b), 10 U.S.C. § 831(b), regardless of whether he was in custody. Courts use a two-part objective/subjective standard to determine whether a soldier is a "suspect." *Muirhead*, 51 M.J. at 96. The test is "whether a reasonable person would consider someone to be a suspect under the totality of the circumstances," or subjectively, "if the investigator considered the interrogated person to be a suspect." *Id.* The courts, however, do not apply this test in reverse and *exclude* soldiers from the "suspect" category if either the objective or the subjective standard is *not* satisfied. The courts must determine that soldiers are not "suspects" under *both* standards. This is clear from the *Muirhead* case, upon which the district court relied. Pet. App. 34a.

Here, the district court used the subjective prong to *exclude* Brosius as a "suspect" without analyzing the evidence objectively. *Id.* 36a. Thus, the court concluded only under the subjective prong that the military courts "fully and fairly" found Brosius was not a "suspect" and that the agents therefore were justified in not giving him rights warnings. This was an error. The district court's analysis conflicts with the *Muirhead* standard. The district court performed no review whatsoever

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[9] This rule was also in effect at the time of Brosius's interrogation.

of whether the military courts "fully and fairly" decided the issue under the *objective* standard.

The Third Circuit declined to consider the issue whether Brosius was a "suspect" entitled to rights warnings. It held that any failure to suppress the June 2 statements was harmless error. Pet. App. 14a. As discussed below, however, this error certainly was not harmless.

The undisputed facts establish that Brosius was a suspect on the evening of June 2 under the objective standard that the district court failed to apply. *See* Statement, *supra*, at 4-5; Pet. App. 24a-25a. In light of these facts, the agents must be deemed to know that Brosius was a suspect and that a rights warning was required. Moreover, the prosecutor at the scene, Captain Ewing, candidly admitted that, had the agents informed him of all of these facts, he would have been led to believe that Brosius was a suspect, Pet. App. 25a, even though the agents claimed they had a good faith belief that Brosius was not a suspect at that time. Additionally, the agents seized Brosius's clothing and sent it away for laboratory analysis, because they learned that it was the same clothing he was wearing when he entered the base with the decedent. *Id.* 24a. It is quite a stretch to say that Brosius was a mere third-party witness, not a suspect, once his clothes were taken.

The agents admitted that, on the following morning, they formed the *subjective* belief that Brosius was a suspect. They also admitted, however, that they formed this belief based on the *same objective facts of which they were aware the previous evening*. *Id.* 24a. They could point to nothing new that appeared by morning.

When faced with Brosius's motion to exclude statements, it was the *government's burden* to prove that Brosius was not a suspect on the evening of June 2. The military trial judge recognized the deficiency in the government's proof, and that Brosius's statements had to be suppressed unless additional evidence was forthcoming. Thus, the judge asked CID Agent

Nash if there was anything else in addition to the previously known facts "that made people take a second look" at Brosius the following morning. R.171. Nash was unable to provide any additional information, and other available witnesses Nash said *might* be able to answer the question were not called. Pet. App. 24a. No one explained whether CID learned *anything* new, and there was *no explanation* of why the agents and Ewing could not have objectively determined on Saturday evening that Brosius was a suspect. The conclusion is inescapable. The evidence that the government had on Sunday morning was the same as it had on Saturday evening.

In his findings and conclusions, the judge said: "On the next day in the CID meeting, the fact that the accused said there were three in the car, and a gate guard said he only saw two, *along with other evidence*, caused the CID to believe that the accused should be considered a suspect." Pet. App. 27a (emphasis added). The judge could not elaborate on what this "other evidence" was, because it was never produced. It remains unknown to this day. *Id.* This is the hole in the record that was never filled and which tips the scale in Brosius's favor on this critical issue.

Thus, on this outcome-determinative issue, the judge made a key ruling based on nothing more than speculation or conjecture. He *assumed* that some unknown evidence supported his decision, and he knew that additional evidence was necessary to deny the suppression motion. That is why he asked such a pointed question at the hearing, and that is why he referred to the mysterious "other evidence." He disregarded his important duty to "state essential findings of fact on the record." *Manual for Courts-Martial, United States, 1984, Military Rules of Evidence*, Rule 304(d)(4). Brosius was never informed of the evidence upon which the trial judge relied to decide that Brosius was not entitled to a rights warning until the morning of June 3.

In *Burns*, this Court stated that federal courts should not re-evaluate evidence considered by military courts, but only so

long as the military courts considered claims "fully and fairly." *Burns*, 346 U.S. at 142. Here, the military court did not "fully" consider this claim, because the trial judge and the prosecutor failed to call available witnesses that another agent said *might* have the answer to the judge's question. A fair inference is that these agents were not called because they had *nothing* additional to offer. Likewise, the judge did not "fairly" make his decision, because he *assumed* the existence of outcome-determinative evidence. The judge's ruling on this issue was neither "full" nor "fair." Because the military court failed to consider this claim "fully and fairly," even *Burns* allows federal courts to re-evaluate the evidence. *Id.*[10]

When ACMR considered this issue, it did not openly rely on the unknown evidence as the trial judge did. ACMR ruled that the agents determined on June 3 that Brosius was a suspect based only on the gate guard discrepancy. Pet. App. 51a. However, ACMR perpetuated the error, because it failed to take the next logical step of finding that CID had that same information the previous evening to conclude under the *objective* standard that Brosius was a suspect. As with the trial judge's decision, the direct military appellate review of this issue was neither "full" nor "fair."

Brosius should have received the UCMJ article 31 rights warning before being questioned, and the failure to give that warning warrants habeas relief. Even beyond that issue, as a separate basis for relief, is the failure to give the required *Miranda* warning during what was a custodial interrogation.

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[10] In fact, the district court here *did* re-evaluate evidence, although it did so erroneously. In concluding that one circumstance changed by June 3 to cause the agents to *subjectively* believe Brosius was a suspect, the court noted that another suspect's "alibis were proving to be true." Pet. App. 36a. The court correctly said, however, that the military did not rely on this. *Id.* The reason was that the agents knew *the previous afternoon* that the other suspect had an alibi, and that is the reason they were interviewing witnesses before they interviewed Brosius. R.146.

D. Brosius was in "custody" when he requested counsel.

Individuals undergoing custodial interrogation are entitled to constitutional rights warnings. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). There is no disagreement here that a person undergoing custodial interrogation who requests counsel is entitled to a lawyer regardless of whether the agents provide *Miranda* warnings. To determine whether a person is in custody, courts once again use an objective standard. *See* Statement, *supra*, at 3-4.

The district court and the Third Circuit both recognized that Brosius was ordered to attend the CID interview, because Brosius's First Sergeant "called" him to the First Sergeant's office and "sent" him there. Pet. App. 38a, 40a, 11a. Applying an overly deferential scope of review, however, both the district court and the Third Circuit decided that they would not disturb the military courts' conclusion that Brosius was not in custody. *Id.* 41a, 11a.

Under a *de novo* scope of review, Brosius's claim has strong merit. As the district court said, the real issue is "whether [Brosius] had been deprived of his freedom of action in any significant way." *Id.* 40a. Federal law, military caselaw, and the realities of military life establish that Brosius was in custody.

Soldiers must obey lawful orders, and if Brosius did not obey *this* order to attend the interview, he could have been punished for disobeying the First Sergeant. UCMJ art. 91(2), 10 U.S.C. § 891(2). The Court of Military Appeals has recognized for decades that an order to appear for an interrogation creates "custody" for *Miranda* purposes. In *Tempia*, just as in this case, a soldier was "called" for an interrogation. The court recognized a distinct difference between civilian and military interrogations.

> In the military, unlike civil life, a suspect may be required to report and submit to questioning quite without regard to

> warrants or other legal process. It ignores the realities of that situation to say that one ordered to appear for interrogation has not been significantly deprived of his freedom of action. . . . Hence, we conclude that there was "custodial interrogation" in this case.

Tempia, 37 C.M.R. at 256 (citation omitted). Military courts continued to understand this reality throughout the years. As ACMR said in 1989, when "an individual['s] superior order[s] him to report to the CID office . . . this face-to-face interview is a *custodial* interview." *United States v. Granda*, 29 M.J. 771, 776 (A.C.M.R. 1989) (emphasis added).

When Brosius was ordered to the interview, there is no question that he was significantly deprived of his freedom of action. He could not ignore the order and exercise "freedom of action." An order is "disobeyed at the subordinate's peril." *United States v. Padgett*, 48 M.J. 273, 276 (C.A.A.F. 1998).

Likewise, on this Saturday evening when Brosius later was directed to report to CID headquarters (the "River Building") to speak to agents there — and to speak to the lawyer the agents said they would provide — his inability to exercise "freedom of action" continued. At the agents' request, the First Sergeant had another Sergeant "escort" Brosius, Pet. App. 12a, thus ensuring that Brosius did not stray from his ordered path or go about any other business.

The agents' request that an "escort" take Brosius to the River Building was the military equivalent of requesting that he be taken there under guard to ensure that he arrived there for his interrogation. Military personnel and judges understand that, in the military, the word "escort" is synonymous with the word "guard." *See United States v. Worstell*, No. ACM 31915, 1996 WL 595229, at *2 (A.F. Ct. Crim. App. Oct. 9, 1996) (personnel assigned to "escort/guard" the appellant); *United States v. Borges*, 41 M.J. 739, 743-45 (N-M Ct. Crim. App. 1994) (reviewing cases where military personnel escaped from "escorts"; "custody" is when the soldier "reasonably knows

that he remains subject to the custodian's influence or control"); *United States v. Johnson*, No. ACM 30890, 1994 WL 175767, at *2 (A.F.C.M.R. Apr. 25, 1994) (appellant "broke away from his escort"). "Custody continues as long as the accused is in the presence of the escort . . . ." *United States v. Clements*, 40 M.J. 713, 714 (N.M.C.M.R. 1994).

These undisputed facts establish that Brosius was in "custody." This case is quite different from a civilian context where someone may "voluntarily" accompany a police officer to the station. Civilians cannot be prosecuted for declining to go. "A key concern for civilian criminal investigators is the procedure by which they arrange for a suspect to be available for interrogation. . . . The military criminal investigators rel[y] on the commander's purported authority to order his soldiers to cooperate in the investigation." *United States v. Schake*, 30 M.J. 314, 317 n.4 (C.M.A. 1990).

Continued questioning was a blatant substantive violation of the Fifth Amendment, not merely a "technical violation" of *Miranda*'s rights-warning requirement, establishing that Brosius's statements were impermissibly compelled from him. *See Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *United States v. Goodson*, 22 M.J. 947, 948-50 (A.C.M.R. 1986) (statement excluded after soldier requested counsel and was then questioned by his commander two days later). Obtaining a statement without *Miranda* warnings "creates a presumption of compulsion," and such statements "must . . . be excluded." *Oregon v. Elstad*, 470 U.S. 298, 307 (1985).

After a statement is obtained in violation *only* of *Miranda*'s technical rights-warning requirement (*i.e.*, if an actual request for counsel is not ignored), subsequent statements can be admitted if there was a proper rights warning and waiver. *See Elstad*, 470 U.S. at 314. This rule applies, however, only if there were no "deliberately coercive or improper tactics in obtaining the initial statement." *Id.* The agents' and prosecutors' tactics in Brosius's case *were* "deliberately coercive or improper." This Court warned that the *Elstad*

"subsequent waiver" rule would not apply in cases "concerning suspects whose invocation of their rights to remain silent and to have counsel present were *flatly ignored* while police subjected them to continued interrogation." *Id.* at 312 n.3 (emphasis added). That is precisely what occurred here. The CID agents did not merely fail to give *Miranda* warnings and then come within the *Elstad* rule by giving warnings later. Ewing and the CID agents engaged in improper tactics to obtain the first statement; they actually denied Brosius's right to counsel and "flatly ignored" his request. The subsequent statements were a follow-on product.

CID's continued questioning of Brosius with Ewing participating was therefore a substantive Fifth Amendment violation, not merely a technical failure to administer *Miranda* warnings, which warrants a presumption that *all* subsequent statements were coerced and improperly compelled from Brosius even though rights warnings were given later. *Elstad*, 470 U.S. at 312 n.3, 314, 318; *see Correll v. Thompson*, 63 F.3d 1279, 1290 (4th Cir. 1995); *Cooper v. Dupnik*, 963 F.2d 1220, 1237 (9th Cir. 1992). This rule applies with more force in the military with its "subtle pressures" than in civilian society. *United States v. Kruempelman*, 21 M.J. 725, 727 (A.C.M.R. 1985).

E. The errors were not harmless.

After finding an error, courts may grant habeas corpus relief if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 776 (1993). The Third Circuit declined to enforce the *Elstad* standard, and instead held that any errors on June 2 were harmless because of later rights warnings. Pet. App. 16a-17a. There is no question, however, that the military courts' mistakes were not harmless error.

It is impossible to overstate the impact of the errors. The Third Circuit reviewed the contents of Brosius's first statement and decided it was of no consequence because it added nothing

new to what he had said to others and because he was given rights warnings later. As the district court said, however, the first statement "led" to the others. *Id.* 19a. It was also used against Brosius at his trial. *Id.*; R.535. If CID would have provided warnings the first time, there is no doubt that Brosius would have invoked his rights and that the questioning would have stopped, *because Brosius in fact did request counsel.* His request should have been honored without efforts to deceive him. If CID had provided conflict-free counsel, that counsel would have been notified before subsequent questioning, and no one can say Brosius would have made subsequent incriminating statements.

This whole questionable procedure resulted in a "confession" that Brosius immediately recanted. There is no other compelling evidence of guilt, and the government's case collapses without Brosius's statements. The "confession," if true, leaves no doubt that forensic evidence should have connected Brosius with the crime, but none of it did. Some evidence was totally inconsistent with this "confession."[11] Further, the "confession" describes a multiple stabbing during a sex act, which should have left huge amounts of blood on Brosius and his clothing; yet, a soldier saw Brosius in the barracks a short time later and said that Brosius had no blood on him. *See* Pet. App. 56a (summarizing the evidence). There was no motive for the murder.

Brosius never would have been convicted but for the existence of this "confession" that the agents and Ewing obtained unconstitutionally and unethically. "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . .'" *Arizona v.*

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[11] A CID agent testified that the "confession" was "erroneous as to certain particulars." Pet. App. 53a. For example, the cuts that the "confession" detailed and the murder weapon that the "confession" described were wrong. *Id.*

Fulminante, 499 U.S. 279, 296 (1991) (citation omitted). The Court should therefore conclude that the errors were not harmless.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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